Supreme Court, U.S.
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No. 05-

IN THE

Supreme Court of the United States

BRANDI M. DEARTH,

Petitioner,

v.

RICHARD L. COLLINS and INFO PRO GROUP, INC.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Is an employer entitled to the *Faragher/Ellerth* affirmative defense in a hostile work environment sexual discrimination case where the creator of the hostile work environment is the president, CEO, and sole director of the employer and is thus the employer's proxy?

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
TABLE OF CONTENTS	ii
TABLE OF CITED AUTHORITIES	iii
TABLE OF APPENDICES	v
OPINIONS BELOW	1
STATEMENT OF JURISDICTION	1
STATUTORY PROVISIONS INVOLVED	1
STATEMENT OF THE CASE	2
REASONS FOR GRANTING THE PETITION	5
CONCLUSION	9

TABLE OF CITED AUTHORITIES

Page

Cases:

Ackel v. National Communication, Inc.,
339 F.3d 376 (5th Cir. 2003) 7

Burlington Industries v. Ellerth,
524 U.S. 742 (1998) 3, 4, 5, 6

Brandi M. Dearth v. Richard L. Collins and Info Pro Group, Inc.,
441 F.3d 931 (11th Cir. 2006) 1

Distasio v. Perkin Elmer Corp.,
157 F.3d 55 (2d Cir. 1998) 8

Faragher v. The City of Boca Raton,
524 U.S. 775 (1998) 3, 4, 5, 6

Harris v. Forklift Systems, Inc.,
510 U.S. 17 (1993) 5

Haugerud v. Amery School District,
259 F.3d 678 (7th Cir. 2001) 7

Indest v. Freeman Decorating,
168 F.3d 795 (5th Cir. 1999) 7

Johnson v. West,
218 F.3d 725 (7th Cir. 2000) 6

Cited Authorities

Page

Oscar Mayer and Co. v. Evans,
44 U.S. 750 (1979) 8

Passantino v. Johnson & Johnson Consumer Products,
212 F.3d 493 (9th Cir. 2000) 7-8

TABLE OF APPENDICES

Page

Appendix A — Opinion Of The United States Court Of Appeals For The Eleventh Circuit Dated March 6, 2006 ..... 1a

Appendix B — United States District Court For The Southern District Of Georgia, Augusta Division Dated March 17, 2005 ..... 11a

Appendix C — Order Of The United States Court Of Appeals For The Eleventh Circuit Denying Petition For Rehearing Filed April 4, 2005 ..... 37a

OPINIONS BELOW

The opinion for which Petitioner, Brandi M. Dearth, is seeking review was rendered by the United States Court of Appeals for the Eleventh Circuit in the case of *Brandi M. Dearth v. Richard L. Collins and Info Pro Group, Inc.*, 441 F.3d 931 (11th Cir. 2006). The Eleventh Circuit Court of Appeals denied a petition for rehearing on April 4, 2006. The decision of the Court of Appeals affirmed the summary judgment granted to the Defendants Richard L. Collins and Info Pro Group, Inc. by the United States District Court for the Southern District of Georgia which issued on March 17, 2005. The decision of the District Court was not published. *See* appendices A - C.

STATEMENT OF JURISDICTION

The jurisdiction of this court to review this case is codified in 28 U.S.C. § 1254(1).

The decision of the Court of Appeals after its refusal to rehear the case was a final judgment. The only further review available to Petitioner is by petitioning this Court for a Writ of Certiorari.

STATUTORY PROVISIONS INVOLVED

42 U.S.C. § 2000(e), *et seq.*

Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000(e), *et seq.* provides protection to employee against prohibited unlawful discrimination in the workplace. One form of gender discrimination is the sexual harassment of an employee.

STATEMENT OF THE CASE

Petitioner, Plaintiff below, Brandi M. Dearth ("Dearth") was employed by Info Pro Group, Inc. ("Info Pro"), Defendant below, a Georgia corporation. Defendant Richard L. Collins ("Collins") is the sole stock owner, the sole director, the president and the chief operating officer of the corporation. Collins was involved in directing and supervising the operations of the business. Dearth was hired on June 13, 2001 as an assistant to Collins. Collins immediately proceeded to direct unwelcome sexual behavior towards Dearth including the following examples:

Collins asked Dearth to have sex with him; told her that everyone has his price, what was hers; told her he wished that she would run away with him; asked her to be his kept woman; asked her to sit on his lap and think of "the first thing that popped up"; told her to turn around so he could see her from behind and said that he "would bet that she liked it that way"; rubbed her stomach and her arms while making sexual comments to her; grabbed her wrists and held them; told her he needed hugs and invited her to rub his shoulders; as she walked away from him, he grabbed her long hair and pulled her back towards him, and passed her money when she bent over. These and similar behaviors were repeated throughout the duration of Dearth's employment.

Dearth was distraught by Collins' treatment of her. She felt uncomfortable, humiliated and unhappy and she suffered from depression and mood swings. She repeatedly rejected Collins and indicated to him that she was not interested in his propositions and that she did not like his behavior. She kept hoping that he would get the message and stop the abusive behavior and that she would not have to resign from her job which she needed.

Info Pro had adopted a policy against sexual harassment. According to the policy an employee who believed that she was subject to inappropriate behavior was to report it to the Human Resources Department. Dearth did not report Collins' behavior to the Human Resources Department because she believed that it would be futile to do so. She believed that since Collins controlled the operations and personnel at Info Pro he was unlikely to heed directives from his subordinates at the Human Resources Department and change his behavior; she also believed there was a high probability that he would immediately fire her.

After working for Info Pro for almost a year and a half and repeatedly rejecting Collins' advances, on November 8, 2002, Collins fired Dearth. Collins' excuse for firing Dearth was that she did not get along with her fellow employees.

After receiving a right-to-sue letter, Dearth filed suit against the Defendants on December 16, 2003 in the Federal Court of the Southern District of Georgia. Both Defendants, Collins and Info Pro, filed motions for summary judgment essentially claiming two bases for their motions: (a) That the severity of the harassing behavior directed by Collins towards Dearth did not rise to the requisite level of egregiousness to constitute hostile work environment sexual harassment pursuant to Title VII of the Civil Rights Act of 1964; and (b) That even if the behavior rose to the requisite level, Info Pro was entitled to the *Faragher/Ellerth* affirmative defense elucidated in *Burlington Industries v. Ellerth*, 524 U.S. 742 (1998) and *Faragher v. The City of Boca Raton*, 524 U.S. 775 (1998). The trial court held that Info Pro was entitled to summary judgment on both accounts. The trial court also held that Collins could not be held liable individually even though Dearth argued that as the alter ego

of the employer, he should be held liable individually for his actions. The decision was issued on March 17, 2005. Notice of Appeal was filed on April 5, 2005.

Dearth appealed the grant of summary judgment to the Eleventh Circuit Court of Appeals arguing that the behaviors exhibited by Collins were sufficiently severe or pervasive to form a hostile work environment under Title VII of the Civil Rights Act of 1964. Dearth also argued that Info Pro was not entitled to claim the *Faragher/Ellerth* affirmative defense, because Collins, the harasser, was the owner and CEO of the employer and thus his behavior was automatically imputed to Info Pro. On March 6, 2006 the Eleventh Circuit Court of Appeals reversed the holding of the lower court as to the severity of the behaviors exhibited by Collins towards Dearth. The Appellate Court held that the behavior was sufficiently egregious to constitute a hostile work environment. However, the Eleventh Circuit Court of Appeals affirmed the lower court's ruling that the employer was entitled to the *Faragher/ Ellerth* affirmative defense because it had adopted a policy and procedure to address issues of sexual harassment but Dearth did not take advantage of the provisions of that policy. Thus the Court of Appeals affirmed the decision of the trial court. Dearth petitioned the Court of Appeals for rehearing to reconsider its holding on the *Faragher/Ellerth* affirmative defense. The Court of Appeals refused to rehear the case on April 4, 2006.

In petitioning this Court for certiorari, Dearth asserts that the Court of Appeals of the Eleventh Circuit erred when it decided that the employer was entitled to the *Faragher/ Ellerth* affirmative defense. Dearth states that as the harassing individual Collins was Info Pro's proxy, hence his behavior should be *automatically* imputed to Info Pro.

REASONS FOR GRANTING THE PETITION

A REVIEW IS WARRANTED TO RESOLVE A SPLIT AMONG THE CIRCUITS.

Title VII of the Civil Rights Act of 1964 provides employees with protection against hostile work environment sexual harassment. To encourage employers to create effective protection for their employees this Court crafted what became known as the *Faragher/Ellerth* affirmative defense, which shields employers from liability for Title VII violations under certain circumstances. In these two cases this Court held that when: (a) an employer had developed a policy and procedure which is reasonably designed to protect employees from sexual harassment; and (b) the employee subject to unlawful behavior unreasonably failed to avail herself of the protection of the policy and procedure, the employer will not be vicariously liable for the unlawful behavior of its employees.

There are two situations when the defense is completely unavailable to employers. The one which is pertinent at bar occurs when the harasser is so highly placed in the employer's organization as to be the employer's proxy. In *Faragher, supra*, this Court cited with approval from *Harris v. Forklift Systems, Inc.*, 510 U.S. 17, 114 S. Ct. 367, 126 L. Ed. 2d 295, (1993) when it stated:

> Nor was it exceptional that standards for binding the employer were not an issue in *Harris, supra*. In that case of discrimination by hostile environment, the individual charged with creating the abusive atmosphere was the president of the corporate employer, 510 U.S. at 19, who was

> indisputably within that class of an employer organization's officials who may be treated as the organization's proxy. *Burns v. McGregor Electronic Industries, Inc.*, 955 F.2d 559, 564 (CA 8 1992) (employer-company liable where harassment was perpetrated by its owner); see *Torres v. Pisano*, 116 F.3d 625, 634 – 635 and n. 11 (CA 2) (noting that a supervisor may hold a sufficiently high position "in the management hierarchy of the company for his actions to be imputed automatically to the employer"), cert. denied, 522 U.S. 997 (1997)); cf. *Katz, supra*, at 255 ("Except in situations where a proprietor, partner or corporate officer participates personally in the harassing behavior," an employee must "demonstrat[e] the propriety of holding the employer liable").

524 U.S. at 789-90.

Several circuit courts have followed this holding. For example, in *Johnson v. West*, 218 F.3d 725 (7th Cir. 2000), the plaintiff argued that the harassing supervisor was the proxy of the employer and thus the employer was not entitled to the *Faragher/Ellerth* affirmative defense. The Court of Appeals of the 7th Circuit held that the harasser was only a low-level supervisor with several successively higher-level supervisors above him, thus he was not the proxy of the employer. Hence there the court did not automatically deprive the employer of the defense but did so only after properly analyzing the level of placement of the harasser in the organization of the employer. The Seventh Circuit Court of Appeals, when discussing employer liability and the

application of the *Faragher/Ellerth* affirmative defense, stated in *Johnson v. West, supra*:

> "An employer is subject to vicarious liability to a victimized employee for an actionable hostile work environment created by a supervisor with immediate (or successively higher) authority over the employee." *Ellerth*, 524 U.S. at 765; *Faragher*, 524 U.S. at 807. "*Vicarious liability automatically applies when the harassing supervisor is either (1) indisputably in that class of employer organization's officials who may be treated as the organization's proxy*," *Faragher*, 524 U.S. at 789 or (2) "when the supervisor's harassment culminates in a tangible employment action such as discharge, demotion or undesirable reassignment." *Id.* at 808. "*Absent either of these situations*, however, an employer may avoid vicarious liability by showing "(a) that the employer exercised reasonable care to prevent and correct promptly any sexually harassing behavior, and (b) that the plaintiff employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise." (Emphasis added)

218 F.3d at 730. *See also Haugerud v. Amery School District*, 259 F.3d 678 at 679 (7th Cir. 2001).

Several other circuits have held likewise. The Fifth Circuit Court of Appeals so held in *Ackel v. National Communication, Inc.*, 339 F.3d 376 (5th Cir. 2003) at 383, and in *Indest v. Freeman Decorating*, 168 F.3d 795 (5th Cir. 1999) n.24. The Ninth Circuit held likewise in *Passantino v.*

Johnson & Johnson Consumer Products, 212 F.3d 493 (9th Cir. 2000) at 516-17. The Second Circuit Court of Appeals, in a slight variation on the theme, held that when the harasser is a highly placed official, notice is automatically imputed to the employer who may not claim a defense due to lack of notice about the behavior. *Distasio v. Perkin Elmer Corp.* 157 F.3d 55 (2d Cir. 1998) at 64.

The United States Equal Employment Opportunity Commission ("EEOC") addressed the issue in section VI of its Enforcement Guidance and held that when the perpetrator of the unlawful harassment is a highly placed official who is the employer's proxy, the employer cannot raise the affirmative defense. Based on *Faragher*, the EEOC further stated that the president and owner of the employer qualifies as the employer's proxy. This Court has held that the directives and interpretations of an agency entrusted by Congress to enforce certain laws, are entitled to deference by the courts. *Oscar Mayer and Co. v. Evans*, 44 U.S. 750, 761, 99 S. Ct. 2066 (1979).

Thus the decision of the Eleventh Circuit Court of Appeals stands in direct opposition to decisions of this Court and the Second, Fifth, Seventh, and Ninth Circuits, as well as, the enforcement directives of the EEOC.

CONCLUSION

Decisions of this Court have demonstrated this Court's efforts to achieve a balance between the rights of a victimized employee subject to a hostile work environment and fairness to employers, especially when th y endeavor to put in place measures to protect their employees. The decision of the Eleventh Circuit Court of Appeals in this case, in addition to standing in direct contrast to decisions of this Court and other circuit courts, also swings the balance too far in protecting the employer and in placing the victimized employee in an untenable position when the harasser is the proxy of the employer. For these reasons, Petitioner respectfully submits that this case deserves review by this Court.

Respectfully submitted,

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APPENDIX

APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT DATED MARCH 6, 2006

UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

No. 05-12039

BRANDI M. DEARTH,

Plaintiff-Appellant,

v.

RICHARD L. COLLINS, INFO PRO GROUP, INC.,

Defendants-Appellees.

March 6, 2006

Before BLACK, HULL and FARRIS*, Circuit Judges.

PER CURIAM:

Appellant Brandi M. Dearth ("Dearth") is a former employee of Info Pro Group, Inc. ("Info Pro"). From June 13, 2001 until her termination on November 8, 2002, Dearth was the administrative assistant to Richard L. Collins ("Collins"), Info Pro's president, director, and sole shareholder. Dearth filed suit against both Info Pro and

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* Honorable Jerome Farris, United States Circuit Judge for the Ninth Circuit, sitting by designation.

Collins, asserting that Collins repeatedly made sexual suggestions and advances toward her and touched her in a sexual manner. Count One of Dearth's complaint asserts a claim of sexual harassment, in violation of Title VII of the Civil Rights Act of 1964. *See* 42 U.S.C. § 2000e-2 ("Title VII"). After review and oral argument, we affirm the district court's grant of summary judgment to both defendants.[1]

I. Collins

As to Collins individually, the district court properly concluded that a Title VII claim may be brought against only the *employer* and not against an individual employee.

Dearth acknowledges that this Court has previously held that " '[t]he relief granted under Title VII is against the employer, not [against] individual employees whose actions would constitute a violation of the Act.' " *Hinson v. Clinch County Bd. of Educ.*, 231 F.3d 821, 827 (11th Cir.2000) (citation omitted); *Busby v. City of Orlando*, 931 F.2d 764, 772 (11th Cir.1991) (also holding that "[i]ndividual capacity suits under Title VII are . . . inappropriate"). However, Dearth asserts that our previous decisions on this point involved only *government* employers and supervisors, as opposed to *private* employers and supervisors (such as Info Pro and

1. Dearth's complaint also contains Counts Two through Seven and includes a Title VII retaliation claim as well as state law claims of assault and battery, negligent supervision, and intentional infliction of emotional distress. However, Dearth does not appeal the district court's grant of summary judgment to the defendants on her retaliation claim or the district court's dismissal without prejudice of her state law claims. As such, we do not discuss those claims.

Collins). As such, Dearth urges us to conclude that, at least "under appropriate circumstances," a harassing supervisor in the private sector, such as Collins, should be held individually liable for a Title VII violation.

We reject Dearth's argument. As the district court correctly recognized, there is nothing in Title VII, *Hinson*, *Busby*, or anywhere else in our precedent that suggests that Title VII's limitation of liability to employers is applicable only in situations where the employer is a public entity. To the extent that we have not so held before, we now expressly hold that relief under Title VII is available against only the employer and not against individual employees whose actions would constitute a violation of the Act, *regardless* of whether the employer is a public company or a private company. *See Hinson*, 231 F.3d at 827; *Busby*, 931 F.2d at 772.

Our holding in this regard is in accordance with the majority of our sister circuits that have addressed this question. *See, e.g., Wathen v. General Elec. Co.*, 115 F.3d 400, 404-05 (6th Cir.1997) (concluding that an individual employee or supervisor who does not otherwise qualify as an "employer" may not be held personally liable under Title VII, and collecting cases from the "majority of our sister circuits" that support that holding); *see also Grant v. Lone Star Co.*, 21 F.3d 649, 651-53 (5th Cir.1994) (concluding that the plaintiff had offered "no persuasive argument why Congress would not have intended to protect private employees, as well [as public employees], from individual [T]itle VII liability" and holding that Title VII "does not permit the imposition of liability upon individuals unless they meet [T]itle VII's definition of 'employer' ").

Dearth also argues that even if individual employees generally cannot be held liable under Title VII, we should make an exception to this rule in the private sector based on the "alter ego" doctrine. Dearth concedes that the corporation "Info Pro was her 'official' employer," but she contends that "Info Pro was Collins'[s] alter ego and . . . [as such,] both he *and* the corporation should be liable to her under Title VII." (emphasis added). Dearth asks us to disregard Info Pro's corporate form and to pierce its corporate veil under Georgia law in order to hold Collins individually liable under Title VII.

We reject Dearth's position on two grounds. First, there is nothing in Title VII that supports Dearth's claim that individual capacity liability can be imposed on the basis of the alter ego doctrine, and the only circuit that we found to have addressed the issue rejected the argument. *See Worth v. Tyer*, 276 F.3d 249, 262 (7th Cir.2001) (rejecting alter ego theory of individual capacity liability in Title VII lawsuit against the president of a company and citing *EEOC v. AIC Security Investigations, Ltd.*, 55 F.3d 1276, 1282 n. 11 (7th Cir.1995)).[2] In *AIC Security Investigations*, the Seventh

2. In *EEOC v. AIC Security Investigations, Ltd.*, the Seventh Circuit concluded that the plaintiffs had waived the alter ego argument, but subsequently discussed, in *dicta*, the merits of whether the alter ego doctrine could be used to impose individual liability under the Americans with Disabilities Act ("ADA"). Title VII, the ADA, and the Age Discrimination in Employment Act all have similar definitions of "employer" and "[c]ourts routinely apply arguments regarding individual liability to all three statutes interchangeably." *AIC Security Investigations*, 55 F.3d at 1279-80. We do the same here by relying on *AIC Security Investigations* as persuasive authority.

Circuit rejected the theory that Vrdolyak, the individual defendant and sole shareholder of AIC Security Investigations, Ltd. ("AIC"), could be held individually liable under the ADA. The Seventh Circuit found nothing in the ADA to support individual liability and noted that "[t]he employing entity is still [potentially] liable." 55 F.3d at 1282. The plaintiffs nevertheless argued, as Dearth does here, that "even if individuals cannot be liable under the ADA, Vrdolyak can somehow be liable as AIC's 'alter ego.'" *Id.* at 1282 n. 11. The Seventh Circuit, however, saw "no good reason why it should make any difference for our analysis whether Vrdolyak was AIC's alter ego" and stated that "as to [Vrdolyak's] individual capacity liability, it does not matter even if she was AIC's alter ego." *Id.*; *see also Worth*, 276 F.3d at 262. The Seventh Circuit acknowledged that if a sole shareholder abused the corporate form and the corporate veil were pierced, the sole shareholder might feel the financial "pinch." *See AIC Security Investigations*, 55 F.3d at 1282 n. 11 (noting that Vrdolyak "might be effectively liable if the corporate veil were pierced, and as sole shareholder, she will necessarily absorb the pinch from AIC's liability"). However, as the Seventh Circuit also recognized, that issue is separate and apart from the question of whether the alter ego doctrine can provide an independent basis for individual capacity liability under Title VII in the first place. *Id.* Furthermore, in this case, there is no allegation that Info Pro is insolvent or unable to pay any Title VII judgment against it. We thus agree with the Seventh Circuit and conclude that the alter ego doctrine does not create an exception to the rule against individual employee liability in Title VII cases.

Second, and in any event, Dearth has failed as a matter of law to establish that Collins is Info Pro's alter ego. Under Georgia corporate law,[3] individual shareholders and officers of a corporation are "shielded by the corporate veil, in the absence of fraud or abuse of the corporate form." *Moore v. Barge*, 210 Ga.App. 552, 554, 436 S.E.2d 746, 749 (1993). The corporate veil occasionally can be pierced by operation of the alter ego doctrine, but the alter ego doctrine applies only if three requirements are met. Specifically,

> "[t]o establish the alter ego doctrine it must be shown [1] that the stockholders' disregard of the corporate entity made it a mere instrumentality for the transaction of their own affairs; [2] that there is such unity of interest and ownership that the separate personalities of the corporation and the owners no longer exist; and [3] to adhere to the doctrine of corporate entity would promote injustice or protect fraud."

McLean v. Cont'l Wingate Co., 212 Ga.App. 356, 359, 442 S.E.2d 276, 279 (1994) (quoting *Custom Lighting & Decorating, Ltd. v. Hampshire Co.*, 204 Ga.App. 293, 295-96, 418 S.E.2d 811, 814 (1992)). To justify piercing the corporate veil, " 'the plaintiff must show [that] the owner abused the corporate form by disregarding the separateness of legal entities by commingling [funds] on an interchangeable or joint basis or confusing the otherwise separate properties, records, or control.' " *Rasheed v.*

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3. The parties agree that Georgia law governs the elements of the alter ego doctrine. Thus, we do not decide whether Georgia or federal law would govern the applicability of the doctrine in Title VII cases or the elements of the doctrine.

Klopp Enters., Inc., 276 Ga.App. 91, 95 n. 4, 622 S.E.2d 442, 446 n. 4 (2005) (citation omitted).

Dearth points to no evidence that Collins disregarded Info Pro's corporate form; that Collins used Info Pro to transact his own affairs or commingled Info Pro's funds with his own funds; or that Collins is hiding behind Info Pro's corporate form in order to protect his own fraudulent behavior. *See McLean*, 212 Ga.App. at 359, 442 S.E.2d at 279. As noted above, there is also no allegation that it is necessary to disregard the corporate form to satisfy any Title VII judgment that Dearth might obtain against Info Pro. Put another way, adherence to the doctrine of corporate entity in this case does not promote injustice or protect fraud. *See Baillie Lumber Co. v. Thompson*, 279 Ga. 288, 289-90, 612 S.E.2d 296, 299 (2005) (piercing of the corporate veil in Georgia is appropriate in order to "remedy injustices," is generally governed by equitable principles, and is appropriate " 'only in the absence of adequate remedies at law' ") (citation omitted); *see also Worth*, 276 F.3d at 262 ("The problem with the 'alter ego' theory [of individual liability in Title VII cases] is that it seeks to impose liability upon shareholders without a showing of fraud or injustice.").

For all of the foregoing reasons, we reject Dearth's argument that she should be allowed to sue and recover against Collins individually under Title VII.[4]

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4. We similarly find no merit in Dearth's argument that the district court abused its discretion in striking five paragraphs of her thirty-six paragraph affidavit in response to defendants' motions for summary judgment.

II. Info Pro

The district court granted Info Pro's motion for summary judgment on two alternative grounds. First, the district court concluded that summary judgment was appropriate for Info Pro because Dearth failed to present any evidence that Collins's alleged sexual harassment conduct was sufficiently severe or pervasive to create a hostile work environment and to alter the terms and conditions of her employment. *See Hulsey v. Pride Rests., LLC*, 367 F.3d 1238, 1244-45 & n. 3 (11th Cir.2004); *Mendoza v. Borden, Inc.*, 195 F.3d 1238, 1245 (11th Cir.1999) (*en banc*). Second, the district court concluded that even if Dearth had established a *prima facie* case of sexual harassment against Info Pro, summary judgment was still appropriate for Info Pro because the so-called *Faragher-Ellerth* affirmative defense barred Dearth's claims. *See Faragher v. City of Boca Raton*, 524 U.S. 775, 118 S.Ct. 2275, 141 L.Ed.2d 662 (1998); *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 118 S.Ct. 2257, 141 L.Ed.2d 633 (1998).

We first conclude that Collins's alleged conduct *was* sufficiently severe and pervasive to establish a *prima facie* case of hostile work environment sexual harassment. However, we agree with the district court's conclusion that the *Faragher-Ellerth* defense bars Dearth's claims against Info Pro. Under the facts of this case, the district court correctly concluded that (1) Info Pro exercised reasonable care to prevent and promptly correct any sexually harassing behavior, by virtue of its sexual harassment policy in its employee handbooks; and (2) Dearth unreasonably failed to take advantage of any preventative or corrective opportunities

provided by Info Pro, or to otherwise avoid harm, by failing to notify anyone at Info Pro of Collins's alleged harassment.[5] *Faragher*, 524 U.S. at 807, 118 S.Ct. at 2292-93; *Ellerth*, 524 U.S. at 765, 118 S.Ct. at 2270. Indeed, Dearth did not make any claims of sexual harassment until she was advised of her termination. Once Info Pro was informed of the alleged sexual harassment, an investigation was immediately conducted by Info Pro's legal counsel. Dearth's arguments that the *Faragher-Ellerth* defense does not apply here lack merit.[6]

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5. Info Pro's employee handbook provides that "[a]n employee who believes that he or she has been subject to harassment or hostile conduct and an employee who witnesses harassment should immediately notify their supervisor or the Human Resources Department."

6. Although Dearth focuses on her hostile work environment sexual harassment claim, Dearth also asserts that she was terminated because she refused Collins's sexual advances. To the extent that Dearth asserts a separate wrongful termination claim, that claim is not subject to the *Faragher-Ellerth* defense. *See Hulsey*, 367 F.3d at 1245-46 (explaining that while the *Faragher-Ellerth* defense is available to bar hostile work environment sexual harassment claims, the defense cannot be used to bar claims of "tangible employment action" sexual harassment, where an employee's refusal to acquiesce to a supervisor's sexual advances results in a specific hiring, firing, reassignment, significant change in benefits, or denial of promotion). However, Dearth's wrongful termination claim fails because Info Pro presented unrebutted evidence that other Info Pro employees complained repeatedly about Dearth's rude behavior and attitude and that Collins had originally intended to terminate Dearth in February 2002 (until Dearth convinced Collins otherwise). In November 2002, the employee complaints about Dearth increased.

(Cont'd)

Appendix A

III. Summary

For all of the above reasons, we affirm the district court's grant of summary judgment to Collins and Info Pro. AFFIRMED.

(Cont'd)

including complaints from Teresa Rhodes and Rhonda Martin in emails to Collins. Additionally, the receptionist reportedly quit because she could no longer work with Dearth. Info Pro established that Dearth was terminated for her job performance, and the evidence did not establish any causal link between her termination and the alleged sexual harassment. *See Frederick v. Sprint/United Mgmt. Co.*, 246 F.3d 1305, 1312 (11th Cir.2001) (recognizing that there must be a causal link between the sexual harassment and the tangible adverse employment action allegedly suffered by the employee). Thus, Dearth's claims are more appropriately considered as hostile work environment sexual harassment claims, and we are able to dispose of those claims via the *Faragher-Ellerth* doctrine.

APPENDIX B — UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF GEORGIA, AUGUSTA DIVISION DATED MARCH 17, 2005

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF GEORGIA AUGUSTA DIVISION

CV 103-204

BRANDI M. DEARTH,

Plaintiff,

vs.

RICHARD L. COLLINS and INFOPRO GROUP, INC.

Defendants.

ORDER

Before the Court in the captioned matter, both Defendants have moved for summary judgment on Plaintiff's claims under Title VII of the 1964 Civil Rights Act, 42 U.S.C. § 2000e - 2000e-17 and on her state law claims. Upon consideration of the parties' briefs, the record evidence and the relevant law, both motions for summary judgment are **GRANTED** for the reasons stated below.

I. FACTUAL BACKGROUND

At all relevant times, Plaintiff Brandi M. Dearth was an employee of Defendant InfoPro Group, Inc. ("InfoPro"). InfoPro is a national medical transcription and health

information management company headquartered and operating out of Augusta, Georgia.[1] (Def.'s St. of Mat. Facts, ¶ 1.) InfoPro was incorporated in 2001 and since that time, Defendant Richard L. Collins ("Collins") has served as InfoPro's Chief Executive Officer and President.

On June 13, 2001, InfoPro hired Plaintiff to serve as the Administrative Assistant to Collins. Throughout her employment, Plaintiff reported directly to Collins. Plaintiff's job duties included the following: preparing correspondence and reports; setting up Collins' travel schedule; answering the telephone; meeting and greeting clients and visitors; performing general clerical duties; maintaining Collins' calendar; and occasionally traveling with Collins. (*Id.* ¶¶ 4, 5, 7.)

Upon the commencement of her employment with InfoPro, Plaintiff received a copy of InfoPro's Employee Handbook. The General Standards of Conduct described in the Employee Handbook provide that InfoPro's employees may not be rude, discourteous, abusive or uncivil; may not treat others in an abusive, discriminatory or harassing manner; and may not interfere with another employee's job performance. (*Id.* ¶¶ 8-9; Dep. of Brandi Dearth, Ex. D-7, at 25-26.) The Employee Handbook also prohibits sexual harassment and provides a procedure through which harassment should be reported:

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1. InfoPro transcribed medical voice dictation data for VA hospitals all over the country, but this service was performed in Augusta, the company's only location. InfoPro employs 50 to 70 people. (Dep. of Richard L. Collins, at 7-9.)

Appendix B

> An employee who believes that he or she has been subject to harassment or hostile conduct and an employee who witnesses harassment should immediately notify their supervisor or the Human Resources Department.

(Dearth Dep., Ex. D-7, at 14.) Once harassment is reported, a full investigation into the matter will be undertaken. (*Id.*)

Collins claims that he became concerned about Plaintiff's ability to effectively perform her job duties at the outset. He also began hearing complaints from other employees about Plaintiff's rude behavior. (Collins Decl.¶ 6.) Collins states that he spoke with Plaintiff on several occasions throughout her employment about her need to improve her attitude and behavior. (Dep. of Richard L. Collins, at 14; Collins Decl. ¶ 7.) Collins claims he decided in February 2002 to terminate Plaintiff because of her unprofessional conduct. After Plaintiff became upset, however, Collins decided to give her a second chance. (Def.'s St. of Mat. Facts, ¶ 13; Collins Decl. ¶ 8.)

Plaintiff admits that Collins threatened to terminate her in February 2002 though she contends the threat was made because she had "talked too much" to other employees. (Dearth Dep. at 66-67.) In particular, Plaintiff recalls that she had been complaining to another employee about Collins' perceived unfair treatment of employees. (*Id.* at 69.)

Collins avers that the complaints about Plaintiff's attitude continued from InfoPro's employees after February 2002. (Collins Decl. ¶ 9; *see also* Rhodes Decl. ¶ 2; Bobbitt

Decl. ¶¶ 2-6; Mertins Decl. ¶ 2; Tallent Decl. ¶¶ 2-3.) In November 2002, the complaints reached "an all-time high." (Collins Decl. ¶ 9.) Two employees, Teresa Rhodes and Rhonda Mertins, complained to Collins that Plaintiff had been rude to their husbands when they called the office. (*Id.* ¶¶ 10-11; Rhodes Decl. ¶¶ 3-4; Mertins Decl. ¶¶ 3-4.) These employees documented their complaints in e-mails sent to Collins on the afternoon of November 8, 2002. (Collins Decl., Exs. D & E.) Further, another employee, InfoPro's receptionist, met with Plaintiff and Ron Bobbitt, InfoPro's Director of Human Resources, on November 7, 2002. (Dearth Dep. at 90-92.) The receptionist decided to quit after the meeting because she could not get along with Plaintiff.[2] (Bobbitt Decl. ¶ 4, Ex. A; Tallent Decl. ¶ 4.)

On November 8, 2002, Collins decided to terminate Plaintiff after discussing the matter with Ron Bobbitt and Ann Collins, InfoPro's Director of Operations. (Collins Decl. ¶ 14.) That evening Collins asked Plaintiff to meet with him and Jamie Culbertson, InfoPro's Director of Marketing, in his office. At the outset of the meeting, Collins informed Plaintiff that she was fired and gave her four weeks of severance pay. (Def.'s St. of Mat. Facts, ¶ 22.) In response, Plaintiff accused Collins of having sexually harassed her on numerous occasions. Collins immediately called Christopher Clements, InfoPro's legal counsel, into the meeting to hear Plaintiff's allegations. (*Id.*; Clements Decl. ¶ 2.)

2. The receptionist states that after she heard of Plaintiff's termination, she called InfoPro and asked for her job back. She was rehired. (Tallent Aff. ¶ 6.)

Appendix B

After hearing Plaintiff's allegations of sexual harassment, Clements immediately began an investigation. (Def.'s St. of Mat. Facts, ¶ 24.) During the investigation, Clements interviewed Collins and nine administrative employees with InfoPro to determine whether any of them had witnessed Collins acting inappropriately towards Plaintiff. Clements did not find anyone who had witnessed any incidences of sexual harassment, and he concluded Plaintiff's termination was performance-based and her allegations of harassment were without merit. (*Id.* ¶¶ 25-26.) Plaintiff does not deny this investigation took place; however, she alleges that the investigation was "meaningless." (Pl.'s Resp. to Def.'s St. of Mat. Facts, ¶ 24.)

For Plaintiff's part, she claims she was sexually harassed by Collins almost from the first day of her employment. (Dearth Dep. at 115-16.) Plaintiff testified that she kept notes of the harassing conduct during her employment and eventually typed them into a list. (*Id.* at 18-19, 156.) In the interest of brevity, I will not recite the details verbatim at this point. Suffice it to say that Plaintiff paints a picture of a working relationship between her and Collins that was sexually charged with innuendos, flirtation, lewd comments, and unwelcome touching. (*See id.*, Ex. D-15.) Plaintiff claims that this sexual harassment made her depressed, irritable and angry and that it affected her relationship with her husband at home. (*Id.* at 7-8, 230-31.) Plaintiff claims that toward the end of her employment, she visited a psychologist once because of the difficulties she was experiencing at work. (*Id.* at 7-8.)

Interestingly, Plaintiff claims that this sexual harassment occurred in and around Collins' office even though Collins' daughter worked in the office next to Collins and his wife and son worked down the hallway. (*Id.* at 163-65.) Plaintiff describes the office area as an "open environment" with Collins' open door remaining open most of the time and people frequently coming in. (*Id.*) Plaintiff further testified that Collins' wife walked in on Plaintiff and Collins many times when he was harassing her. (*Id.* at 194.)

Plaintiff admits that she did not file a charge with the Equal Employment Opportunity Commission ("EEOC") or through the procedure set up in the Employee Handbook. (*Id.* at 87, 225.) She did not complain about the conduct to Collins, the Human Resource Directors, or the company's attorney. (*Id.* at 87-88.) The first time she complained about Collins' inappropriate behavior was minutes after she was terminated. Plaintiff claims that Collins' reasons for firing her were manufactured in the last few weeks leading to her dismissal because he tired of her rebuffs. (*Id.* at 225-27.) She contends that Collins asked her to enforce a "no personal call" telephone policy with the employees in November 2002 to cause problems between Plaintiff and her co-workers. (*Id.* at 226.) Plaintiff claims that she never knew that any co-worker (except the receptionist) complained of her rude behavior. (*Id.* at 97-99, 227-28.) She further claims that Collins forced the employees to write the complaining e-mails on November 8, 2002. (*Id.* at 227-29.) In short, Plaintiff alleges that she was sexually harassed throughout her employment and that Collins terminated her when she refused to give in to his advances.

Appendix B

Plaintiff filed an EEOC charge of discrimination within a week of her termination. (*Id.*, Ex. D-9.) Upon receiving a Right to Sue letter, Plaintiff brought the instant lawsuit against both InfoPro and Collins. In addition to her claims of retaliation and sexual harassment under Title VII, Plaintiff has set forth state law claims of assault and battery, negligent supervision, and intentional infliction of emotional distress, as well as claims for attorney's fees and costs and punitive damages.

II. REQUIREMENTS FOR SUMMARY JUDGMENT

The Court should grant summary judgment only if "there is no genuine issue as to any material fact and . . . the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). Facts are "material" if they could affect the outcome of the suit under the governing substantive law. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). The Court must view the facts in the light most favorable to the non-moving party, *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986), and must draw "all justifiable inferences in [its] favor," *United States v. Four Parcels of Real Property*, 941 F.2d 1428, 1437 (11th Cir. 1991) (en banc) (internal punctuation and citations omitted).

The moving party has the initial burden of showing the Court, by reference to materials on file, the basis for the motion. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). How to carry this burden depends on who bears the burden of proof at trial. *Fitzpatrick v. City of Atlanta*, 2 F.3d 1112, 1115 (11th Cir. 1993). If the *movant* bears the burden of proof at trial, that party "must show that, on all the essential

elements of its case, . . . no reasonable jury could find for the non-moving party." *Four Parcels*, 941 F.2d at 1438. On the other hand, if the *non-movant* has the burden of proof at trial, the movant may carry the initial burden in one of two ways—by negating an essential element of the non-movant's case or by showing that there is no evidence to prove a fact necessary to the non-movant's case. *See Clark v. Coats & Clark, Inc.*, 929 F.2d 604, 606-08 (11th Cir. 1991) (explaining *Adickes v. S.H. Kress & Co.*, 398 U.S. 144 (1970) and *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986)). Before the Court can evaluate the non-movant's response in opposition, it must first consider whether the movant has met its initial burden of showing that there are no genuine issues of material fact and that it is entitled to judgment as a matter of law. *Jones v. City of Columbus*, 120 F.3d 248, 254 (11th Cir. 1997) (per curiam). A mere conclusory statement that the non-movant cannot meet the burden at trial is insufficient. *Clark*, 929 F.2d at 608.

If—and only if—the movant carries its initial burden, the non-movant may avoid summary judgment only by "demonstrat[ing] that there is indeed a material issue of fact that precludes summary judgment." *Id.* Again, how to carry this burden depends on who bears the burden of proof at trial. If the *movant* has the burden of proof at trial, the non-movant may avoid summary judgment only by coming forward with evidence from which a reasonable jury could find in its favor. *Anderson*, 477 U.S. at 249. If the *non-movant* bears the burden of proof at trial, the non-movant must tailor its response to the method by which the movant carries its initial burden. If the movant presents evidence affirmatively negating a material fact, the non-movant "must respond with

evidence sufficient to withstand a directed verdict motion at trial on the material fact sought to be negated." *Fitzpatrick*, 2 F.3d at 1116. If the movant shows an absence of evidence on a material fact, the non-movant must either show that the record contains evidence that was "overlooked or ignored" by the movant or "come forward with additional evidence sufficient to withstand a directed verdict motion at trial based on the alleged evidentiary deficiency." *Id.* at 1116-17. The non-movant cannot carry its burden by relying on the pleadings or by repeating conclusory allegations contained in the complaint. *See Morris v. Ross*, 663 F.2d 1032, 1033-34 (11th Cir. 1981). Rather, the non-movant must respond by affidavits or as otherwise provided by Fed. R. Civ. P. 56.

The Clerk has given the non-moving party notice of the summary judgment motion and the summary judgment rules, of the right to file affidavits or other materials in opposition, and of the consequences of default. (Doc. Nos. 28, 36.) Therefore, the notice requirements of *Griffith v. Wainwright*, 772 F.2d 822, 825 (11th Cir. 1985) (per curiam), are satisfied. The time for filing materials in opposition has expired, and the motions are ripe for consideration.

III. OBJECTIONS TO PLAINTIFF'S AFFIDAVIT

In response to Defendants' motion for summary judgment, Plaintiff filed a thirty-six paragraph affidavit. Defendants now object to several of the paragraphs on the basis that they are conclusory, that is, assertions without competent factual support or not based on Plaintiff's personal knowledge. Defendants also object to Exhibit A to the affidavit as inadmissible hearsay.

Appendix B

First, Exhibit A is the five-page type-written document in which Plaintiff details a laundry list of harassing conduct by Collins over the one and a half year period of her employment with InfoPro. Plaintiff testified during her deposition that she had typed this list and turned it over to the EEOC in connection with her charge of sexual harassment. (Dearth Dep. at 18-19, 156.) The list was made a part of the record as an exhibit to Plaintiff's deposition. (*Id.*, Ex. D-15.) She testified that she had been keeping track of Collins' conduct on various scraps of paper throughout her employment. Thus, some of the activity is dated to correspond to the date she had taken a note of Collins' behavior. Other items on the list are undated and came from her recollection of events. (*Id.* at 156-59.) Plaintiff was cross-examined in her deposition about the list in some detail. Moreover, while the list contains some hearsay involving instances with other employees that Plaintiff did not witness, for the most part the list recites instances that Plaintiff alleges to have occurred between her and Collins to which she can testify at trial. I therefore overrule Defendants' objection to the exhibit.

I have reviewed the paragraphs of Plaintiff's affidavit to which Defendants object. Many of the paragraphs assert Plaintiff's opinion or perception of what occurred at InfoPro.[3] Most of the affidavit simply reiterates or summarizes

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3. *See* Dearth Aff. ¶ 3 ("Defendant Collins made no bones of the fact that part of the reason for his hiring me was the fact that he found me attractive."); *id.* ¶ 27 ("The reason that Collins attempted to fire me in February 2002 had nothing to do with my performance or my relations with other employees.").

Appendix B

Plaintiff's deposition testimony.[4] Some of the objected to paragraphs are irrelevant to the issues at summary judgment. Upon due consideration, I overrule Defendants' objections with the following exceptions.

> Paragraph 19: "No one, including the corporation's attorney, would have conducted a meaningful investigation of any complaint I would have made. Instead other supervisors, including Mr. Clement[s] and Mr. Bobbitt, witnessed some of Collins' acts of harassment towards me as well as inappropriate behaviors of other male employees, but no male employee was counseled or reprimanded about inappropriate behavior towards female employees. The corporation's anti-sexual harassment policy remained just that, a policy which was never followed or enforced."
>
> Paragraph 33: "[Mr. Bobbitt] made no effort to intervene when inappropriate sexual comments were made in his presence."
>
> Paragraph 34: "Mr. Bobbitt was completely under the control of Mr. Collins and would have done his

4. *See* Dearth Aff. ¶ 28 ("The barrage of complaints that were placed in my file immediately at the time of my dismissal or immediately thereafter, where (sic) manufactured to support Collins' decision to fire me."); *id.* ¶ 36 ("Towards the end of my employment, Collins made comments to me such as 'why don't you love me' and 'you are never going to give it to me'. These statements showed his realization that I was not going to succumb to his advances and reflected that true reason for my dismissal, which was his displeasure with my rejection of his advances.").

> bidding regardless of what the request may have been."

These statements are unsupported by the facts of the case. Plaintiff has presented no evidence that Clements or Bobbitt witnessed Collins' acts of harassment without intervention. In fact, they both deny as much. (Bobbitt Aff. ¶ 12; Clements Aff. ¶ 11.) She also presents no evidence that other female employees were harassed by other male employees. Finally, she has no evidence to support an allegation that Bobbitt was under the control of Collins. Accordingly, Plaintiff has no basis to conclude that InfoPro's harassment policy was not followed or enforced. Defendants' objection to these portions of paragraphs 19, 33 and 34 are sustained.

> Paragraph 30: "Some of the employees were obviously not happy about the curtailment of the use of the telephone. . . ."

> Paragraph 32: "[N]or had there been complaints about my being rude or mean to anyone prior to November 7' or November 8th."

These statements, are unsupported by the facts of the case. Plaintiff has presented no evidence that the employees were unhappy with anything except her. Also, the record shows that the employees described Plaintiff as a constant source of friction in the office about which they often complained. (Bobbitt Aff. ¶¶ 3, 6; Mertins Aff. ¶ 5; Tallent Aff. ¶¶ 3, 5.) Defendants' objection to these portions of paragraphs 30 and 32 are sustained.

Appendix B

IV. LEGAL ANALYSIS

A. *Plaintiff's Title VII Claims*

Plaintiff's complaint sets forth two claims under Title VII: first, she was sexually harassed throughout her employment with InfoPro; and second, her termination was retaliatory. Plaintiff asserts these claims against both Defendant Collins and Defendant InfoPro. Defendants move for summary judgment on both claims.

1. *Plaintiff's Claims against Collins.*

"The relief granted under Title VII is against the employer, not individual employees whose actions would constitute a violation of the Act." *Hinson v. Clinch County, Georgia Bd. of Educ.*, 231 F.3d 821, 827 (11th Cir. 2000) (quoting *Busby v. City of Orlando*, 931 F.2d 764, 772 (11th Cir. 1991)).[5] It seems clear to the Court, therefore, that Plaintiff holds no Title VII claim against Collins.

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5. I reject any suggestion from Plaintiff that this rule only applies to cases involving public employment. I agree with other district courts in the Eleventh Circuit that have determined that *Busby's* holding of no individual liability under Title VII also applies in the private employment context. *See Mangrum v. Republic Indus., Inc.*, 260 F. Supp. 1229, 1252 (N.D. Ga. 2003); *Vernon v. Med. Mgmt. Assoc. of Margate, Inc.*, 912 F. Supp. 1549, 1555 (S.D. Fla. 1996) ("[N]othing in the language of [*Busby*] suggests that [the Eleventh Circuit's] discussion of individual liability under Title VII is limited to claims . . . against public employers."); *Smith v. Capital City Club*, 850 F. Supp. 976, 979 (M.D. Ala. 1994).

Appendix B

Plaintiff contends that this Court should make an exception to this principle of law in the instant case based upon the "alter ego doctrine." Plaintiff cites to Georgia law pursuant to which owners of business entities are held liable to third parties for the torts of their businesses on the grounds that the corporation is but the alter ego of its owner. Plaintiff points out that Collins was the sole shareholder, director, president and CEO of InfoPro. Collins also had control of hiring and firing employees and setting business policies.

District courts in the Eleventh Circuit have recognized that the extension of the "alter ego doctrine" to discrimination cases brought pursuant to Title VII may be justified in only two discrete circumstances: (1) where an employer goes bankrupt; and (2) where it is necessary to "pierce the corporate veil" to gain access to the assets of the individual owner. *See Moss v. W & A Cleaners*, 111 F. Supp. 2d 1181, 1186 (M.D. Ala. 2000); *Smith v. Capital City Club*, 850 F. Supp. 976, 979 (M.D. Ala. 1994). In the instant case, Plaintiff has presented no evidence that InfoPro is insolvent and that it is necessary to disregard the corporate form to afford her an avenue of recovery. Similarly, there is no evidence that Collins disregarded the corporate form and commingled the corporate funds with his personal funds. In short, there is insufficient evidence to justify Plaintiff's theory of recovery under the "alter ego doctrine."

For these reasons, Defendant Collins is entitled to summary judgment on Plaintiff's Title VII claims against him.

Appendix B

2. *Plaintiff's Retaliation Claim.*

A retaliation claim under Title VII requires Plaintiff to prove that "(1) she participated in an activity protected by Title VII; (2) she suffered an adverse employment action; and (3) there is a causal connection between the [the first two elements]." *Gupta v. Florida Bd. of Regents*, 212 F.3d 571, 587 (11th Cir. 2000). In this case, Plaintiff claims that her termination was a retaliatory act.

Plaintiff admits that she did not file her EEOC charge prior to her termination from InfoPro. (Def.'s St. of Mat. Facts, ¶ 31.) Plaintiff further admits that she did not lodge a complaint against Collins pursuant to the harassment policy and procedure of the Employee Handbook. (Dearth Dep. at 87.) She never reported any harassing conduct to the two directors of Human Resources or the company's attorney. (*Id.* at 87-88.) Indeed, Plaintiff admits that she did not complain about the conduct to Collins himself, stating that she let him know his behavior was unwelcome by giving him the cold shoulder, walking away, or rolling her eyes. (*Id.* at 119, 140-41.) Plaintiff claims she was afraid she would lose her job if she protested. (*Id.* at 141.) She avers in her affidavit that because Collins was her supervisor, she "did not think it was sensible to report his behavior to anyone. Requesting an investigation of the matter from anyone would have been nothing short of ridiculous." (Dearth Aff. ¶ 19.)

"Statutorily protected expression includes internal complaints of sexual harassment to superiors as well as complaints lodged with the EEOC. . . ." *Pipkins v. City of Temple Terrace, Fla.*, 267 F.3d 1197, 1201 (11th Cir. 2001).

In the instant case, however, Plaintiff did not make internal complaints of sexual harassment to anyone at InfoPro. Plaintiff argues that her non-verbal actions of giving Collins the cold shoulder, walking away and rolling her eyes constitute internal complaints; however, she cites to no binding authority that her non-verbal rejection of alleged sexual advances rises to the level of statutorily protected expression. I conclude as a matter of law that it does not under the circumstances.[6] *Accord Murray v. Chicago Transit Auth.*, 252 F.3d 880, 890 (7th Cir. 2001); *Del Castillo v. Pathmark Stores, Inc.*, 941 F. Supp. 437, 438-39 (S.D.N.Y. 1996) ("[T]he broadest interpretation of a retaliation claim cannot encompass instances where the alleged 'protected activity' consists simply of declining a harasser's sexual advances. . . . If it were otherwise, every harassment claim would automatically state a retaliation claim as well.") This is particularly true when, according to Plaintiff, she rebuffed Collins' alleged advances from the start in this manner. It begs the question of why it then took Collins one and a half years to terminate her. Thus, there does not appear to be a causal connection between her non-verbal communication and her termination. In short, any protected expression on Plaintiff's part occurred only after she was informed that she was being terminated. Accordingly, Defendant InfoPro is entitled to summary judgment on Plaintiff's claim of retaliation.

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6. In so holding, I do not suggest that there can never be circumstances in which a plaintiff's refusal of sexual advances may manifest itself in conduct that is sufficient to constitute protected activity; those circumstances are simply absent in the facts of this case as alleged by Plaintiff. Certainly, the rejection should be more pronounced than a shrug of the shoulder and a roll of the eyes.

Appendix B

3. *Plaintiff's Sexual Harassment Claim.*

Plaintiff claims that she was subjected to a hostile work environment because of Collins' sexual harassment. To prove a hostile work environment, a plaintiff must show "(1) that she belongs to a protected group; (2) that she has been subject to unwelcome sexual harassment . . . (3) that the harassment [was] based on her sex; (4) that the harassment was sufficiently severe or pervasive to alter the terms and conditions of employment and create a discriminatorily abusive working environment; and (5) a basis for holding the employer liable." *Mendoza v. Borden, Inc.*, 195 F.3d 1238, 1245 (11th Cir. 1999) (en banc). Defendant InfoPro contends that Plaintiff cannot establish the fourth element as a matter of law. InfoPro also contends that it is entitled to the *Faragher-Ellerth* defense in any event.

a. *"Severe and pervasive" element.*

The element that "tests the mettle" of a sexual harassment claim is the "sufficiently severe or pervasive" element. *Gupta*, 212 F.3d at 583. Sexual harassment is actionable under Title VII only if it is "so severe or pervasive as to alter the conditions of [the victim's] employment and create an abusive working environment." *Clark County School Dist. v. Breeden*, 532 U.S. 268, 270 (2001) (quotes and cite omitted); *Mendoza*, 195 F.3d at 1245. This requires a showing of conduct that: (1) is objectively severe or pervasive; and (2) the employee subjectively perceives as hostile or abusive. *Breda v. Wolf Camera, Inc.*, 148 F. Supp. 2d 1371, 1374

(S.D. Ga. 2001). There is no dispute in the instant case that Plaintiff perceived Collins' conduct as hostile and abusive.[7]

To determine whether the alleged harassment is "objectively severe or pervasive," courts consider the frequency and severity of the conduct, whether the conduct is physically threatening or humiliating, or a mere offensive utterance, and whether the conduct unreasonably interferes with the employee's job performance. *Mendoza*, 195 F.3d at 1246. That means that "courts should examine the conduct in context, not as isolated acts, and determine under the totality of the circumstances whether the harassing conduct is sufficiently severe or pervasive to alter the terms or conditions of the plaintiff's employment and create a hostile or abusive working environment." *Id.*

In analyzing the objective component of the severe and pervasive element, a court must ask whether "a reasonable person in plaintiff's position [would] find the harassment severe and pervasive." *Breda*, 148 F. Supp. 2d at 1374 (quoted source omitted). Here, Plaintiff alleges approximately one and half years of harassment. (*See generally* Dearth Dep., Ex. D-15.) Plaintiff claims that Collins, her immediate

7. It is noteworthy that while Plaintiff claims she was humiliated and intimidated, she allowed the alleged conduct to occur for one and a half years without complaint until she was terminated. Given the length of time Plaintiff allowed the conduct to occur without complaint and the circumstances under which she reported the sexual harassment, it is questionable that Plaintiff subjectively perceived Collins' conduct toward her as so severe as to alter her conditions of employment. Nevertheless, Defendants do not dispute Plaintiff's claim that she perceived Collins' conduct as severe and pervasive.

supervisor, would grab her waist on occasion, often patted her stomach and once pulled her hair when she tried to walk away from him. (Dearth Dep. at 176, 209.) Collins allegedly tried to hold Plaintiff's hand on the airplane and often asked her to rub his shoulders. (*Id.* at 182.)

Plaintiff alleges Collins verbally harassed her too. He would comment that he was not getting any at home (*id.* at 174); say he loved her numerous times (*id.* at 171); ask her why she did not care for or love him (*id.* at 163, 172); ask her to have sex with him (*id.* at 163); often say "please" indicating he wanted to have sex (*id.*); say they should run away and get married (*id.* at 163, 195-96); and comment that Plaintiff was his (*id.* at 106-07). Collins told Plaintiff of sexual dreams he had of her. (*Id.* at 174-75.) He told the temp agency representative shortly after Plaintiff came to InfoPro that he had not been able to get any work done since she got there. (*Id.* at 167.) He commented to a third party on the telephone that he would understand why he hired Plaintiff when he saw her. (*Id.* at 114.) He twice passed Plaintiff money when she bent over. (*Id.* at 169-70.) Collins also made the following comments: told Plaintiff everything had a price and asked what was hers (*id.* at 175); asked if Plaintiff wanted to be a kept woman (*id.* at 186); asked Plaintiff to sit on his lap and think of the first thing that popped up (*id.* at 191); asked Plaintiff to fail an exam so he could punish her (*id.* at 197); while Plaintiff was squatting down, Collins told her to stay there because he liked her down there (*id.* at 188); and while wiping off his face, Collins stated that he was clearing

off a place for her to sit down (*id.* at 173).[8] Most of this alleged conduct took place in an open environment and with Collins' wife, daughter and son close by. (*Id.* at 163-65.)

In some cases, determining whether the "parade of horribles" listed by a plaintiff is sufficient to survive summary judgment is not an easy task. *See Breda*, 148 F. Supp. 2d at 1376-78 (Edenfield, J.) (detailing the complexity of answering the question of what is sufficiently severe sexual harassment). In the instant case, however, the determination is simpler. Plaintiff must present evidence that shows harassment of such magnitude that it altered her work environment. *E.E.O.C. v. R & R Ventures*, 244 F.3d 334, 341 (4th Cir. 2001) ("[T]he inquiry is not whether work has been impaired, but whether working conditions have been discriminatorily altered." (quoted source omitted)); *Mendoza*, 195 F.3d at 1245-46.

In light of the totality of the circumstances, Plaintiff's allegations may demonstrate a hostile and abusive environment,[9] but Plaintiff presents no evidence that Collins'

8. Plaintiff also testified that Collins said he would "kill her" if she revealed certain secrets to anyone such as the fact that Collins admitted cheating on his wife and that he did not graduate from high school. (Dearth Dep. at 132-33.) However, this alleged statement is not sexual or gender-related in nature and will not be considered by the Court.

9. However, when I compare Plaintiff's "parade of horribles" against the keystone cases of the Eleventh Circuit, *Mendoza* and *Gupta*, Plaintiff's case does not appear to reach the severity level of other cases listed in *Mendoza* that also did not survive summary judgment on this issue.

conduct interfered with or altered her job duties. Instead, there is evidence that Plaintiff was given an office upon request (Dearth Dep. at 164), received two raises during her employment and a bonus (*id.* at 50, 139-40), and was given a second chance to save her employment in February 2002 (*id.* at 73). Plaintiff suffered no salary or benefits loss. She does not allege that she was unable to perform her job duties. True, Title VII does not require

> any direct economic consequences, [but] the employer's action must impact the "terms, conditions, or privileges" of the plaintiff's job in a real and demonstrable way, and the asserted impact cannot be speculative and must at least have "a tangible adverse effect" on the plaintiff's employment. "[T]he employee's subjective view of the significance and adversity of the employer's action is not controlling; the employment action must be materially adverse as viewed by a reasonable person in the circumstances." The limitation is consistent with the basic principle that "Title VII[] is neither a general civility code nor a statute making actionable the 'ordinary tribulations of the workplace.'"

Brown v. Sybase, Inc., 287 F. Supp. 2d 1330, 1339 (S.D. Fla. 2003) (quoted and cited sources omitted). Plaintiff cannot rely upon her subjective view of the significance and adversity of her employer's action; it must be materially adverse as viewed by a reasonable person under the circumstances. *Id.* There must be "some threshold level of substantiality that must be met for unlawful discrimination to be cognizable." *Wideman v. Wal-Mart Stores, Inc.*, 141 F.3d 1453, 1456 (11th Cir. 1998).

Appendix B

In the instant case, Plaintiff points to no evidence that rises to the "adverse" level. She spends much of her time discussing the "parade of horribles" but no time showing that there was a significant demotion or some other sufficiently substantial adverse result to show the conduct was objectively severe and pervasive.[10]

In short, without showing that Collins' alleged conduct was sufficiently severe or pervasive to alter the terms or conditions of her' employment, Plaintiff cannot establish a prima facie case of sexual harassment.

b. *Faragher-Ellerth defense.*

Even if Plaintiff could establish a prima facie case of sexual harassment, under *Burlington Industries, Inc. v. Ellerth*, 524 U.S. 742 (1998), an employer will not be vicariously liable for alleged supervisor sexual harassment if:

> (a) [it] exercised reasonable care to prevent and correct promptly any sexually harassing behavior; and
>
> (b) [the] plaintiff employee unreasonably failed to take advantage of any preventative or corrective

10. To the extent that Plaintiff wishes to use her separation from employment as an adverse employment action, it must be remembered that Plaintiff was fired; she did not quit because of the hostile environment. Indeed, Plaintiff offered no proof in her deposition that she had planned to leave her employ prior to her termination. (Dearth Dep. at 120.) Thus, she cannot argue a "constructive discharge." Moreover, her retaliatory discharge claim has been disposed of *supra*.

> opportunities provided by the employer or to avoid harm otherwise.

Id. at 765. This defense is not available "when the supervisor's harassment culminates in tangible employment action." *Id.*; *Faragher v. City of Boca Raton*, 524 U.S. 775, 807 (1998). As discussed above, no tangible employment action is alleged here.[11]

The first prong is met if an employer promulgates a policy that is "comprehensive, well-known to employees, vigorously enforced, and provides alternate avenues of redress." *Farley v. American Cast Iron Pipe Co.*, 115 F.3d 1548, 1554 (11th Cir. 1997). A policy must not be administered "in bad faith" or be "otherwise defective or dysfunctional." *Madray v. Publix Supermarkets, Inc.*, 208 F.3d 1290, 1299 (11th Cir. 2000) (quoting *Brown v. Perry*, 184 F.3d 388, 396 (4th Cir. 1999)).

Here InfoPro had in place a policy to deal with workplace harassment as set forth in its Employee Handbook. (Dearth Dep., Ex. D-7.) The policy made clear that no form of harassment, including that based on sex, would be tolerated. In pertinent part, the policy states:

> An employee who believes that he or she has been subject to harassment or hostile conduct and an

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11. "[A] tangible employment action constitutes a *significant* change in employment status such as hiring, firing, failure to promote, reassignment with significantly different responsibilities, or a decision causing a significant change in benefits." *Burlington Indus., Inc.*, 524 U.S. at 761 (emphasis added).

> employee who witnesses harassment should immediately notify their supervisor or the Human Resources Department.

(*Id.*, Ex. D-7, at 14.) The policy provides two avenues of redress, directing employees to their supervisor or to the Human Resources Director. Once harassment is reported, the report will be kept confidential until a full investigation into the matter is conducted. (*Id.*) The policy also prohibits retaliation against employees making harassment complaints and any witnesses. (*Id.*, at 14-15.) This evidence establishes that InfoPro exercised reasonable care to prevent and correct harassing behavior in the workplace. Further, Plaintiff has failed to show any evidence that the policy was administered in bad faith or that the policy was somehow defective. *See Brown*, 184 F.3d at 396 (where "there is no evidence [of] bad faith or that the policy was otherwise defective or dysfunctional, [its] existence . . . militates strongly in favor of a conclusion that the employer 'exercised reasonable care to prevent' and promptly correct sexual harassment" (quoting *Faragher*, 524 U.S. at 807)). Moreover, when Plaintiff eventually complained of the sexual harassment on the day of her termination, InfoPro undertook an immediate and full investigation.

To benefit from the *Faragher-Ellerth* defense, InfoPro must also show by a preponderance of the evidence that the plaintiff unreasonably failed to take advantage of its policy. This Court has explained that "reading *Ellerth* and *Faragher* in concert with existing Eleventh Circuit caselaw, the new keystone to a sexual harassment claim is notice. The notice must be sufficient to afford an employer with a reasonable

opportunity to remedy the problem." *Jones v. USA Petroleum Corp.*, 20 F. Supp. 2d 1379, 1385 (S.D. Ga. 1998) (Edenfield, J.).

In the case at bar, Plaintiff admits that she never directly told Collins that his words and actions offended her. Nor did she complain about his alleged sexual harassment to anyone else. Accordingly, it is clear that Plaintiff unreasonably failed to take advantage of InfoPro's policy. Thus, it is unreasonable to expect InfoPro to have acted to prevent or remedy the situation.

In conclusion, I find that InfoPro prevails on its *Faragher-Ellerth* defense as a matter of law. Accordingly, InfoPro is entitled to summary judgment on Plaintiff's sexual harassment claim.

B. *Plaintiff's State Law Claims*

When no federal question claims are left in a case like this, prudential considerations prompt the Court to *sua sponte* question the propriety of retaining jurisdiction over remaining state law claims. *See Mergens v. Dreyfoos*, 166 F.3d 1114, 1119 (11th Cir. 1999) (stating that a district court may dismiss state law claims after dismissing federal claims; "[m)ore specifically . . . if the federal claims are dismissed prior to trial, [*United Mine Workers v. Gibbs*, 383 U.S. 715, 726 (1966)] *strongly encourages or even requires* dismissal of state claims" (quotes and cite omitted) (emphasis added)).

Jurisdiction over Plaintiff's state law claims rested solely upon 28 U.S.C. § 1367. Absent Plaintiff's showing that she

retains viable federal claims against Collins or InfoPro, the absence of a federal claim places supplemental jurisdiction in doubt. 28 U.S.C. § 1367(c)(3). Moreover, "[b]ecause 28 U.S.C. § 1367(d) tolls any applicable state statute of limitations, there is no unfairness to Plaintiff resulting from dismissal." *Smith ex rel. Lanham v. Greene County School Dist.*, 100 F. Supp. 2d 1354, 1368 (M.D. Ga. 2000); *see also United States Anchor Mfg., Inc. v. Rule Industries, Inc.*, 7 F.3d 986, 1005 (11th Cir. 1993); *Linder v. Richmond County, Ga.*, 844 F. Supp. 764, 769 (S.D. Ga. 1994). Accordingly, I will dismiss Plaintiff's state law claims.

IV. CONCLUSION

Upon the foregoing, both Defendant InfoPro Group, Inc. and Defendant Richard L. Collins are entitled to summary judgment; thus, their motions (doc. nos. 25 & 29] are **GRANTED**. Plaintiff's state law claims are **DISMISSED WITHOUT PREJUDICE**. 28 U.S.C. § 1367(c)(3). The Clerk is instructed to **ENTER FINAL JUDGMENT** in favor of Defendants. Costs are taxed against Plaintiff.

ORDER ENTERED at Augusta, Georgia, this 17th day of March, 2005.

s/ [illegible]
UNITED STATES DISTRICT JUDGE

APPENDIX C — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT DENYING PETITION FOR REHEARING FILED APRIL 4, 2005

IN THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

No. 05-12039-JJ

BRANDI M. DEARTH,

Plaintiff-Appellant,

versus

RICHARD L. COLLINS,
INFO PRO GROUP, INC.,

Defendants-Appellees.

On Appeal from the United States District Court for the Southern District of Georgia

BEFORE: BLACK, HULL and FARRIS*, Circuit Judges.

PER CURIAM:

The petition(s) for rehearing filed by Appellant is DENIED.

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* Honorable Jerome Farris, United States Circuit Judge for the Ninth Circuit, sitting by designation.

Appendix C

ENTERED FOR THE COURT:

s/ [illegible] Hull
UNITED STATES CIRCUIT JUDGE

FILED
AUG 18 2006
OFFICE OF THE CLERK
SUPREME COURT, U.S.

No. 05-1591

IN THE

Supreme Court of the United States

BRANDI M. DEARTH,

Petitioner,

v.

RICHARD L. COLLINS and INFOPRO GROUP, INC.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

I. Whether Petitioner has presented a compelling reason to grant the Petition given that the question of whether an employer is entitled to the *Faragher-Ellerth* defense where the alleged harasser is a proxy for the employer was not presented or addressed in the proceedings below.

II. Whether Petitioner has presented a compelling reason to grant the Petition given that there is no evidence in the record supporting a claim that Richard Collins' job duties and level of control of the Company's operations were such that he should be deemed a proxy for InfoPro Group, Inc.

CORPORATE DISCLOSURE STATEMENT

Respondent InfoPro Group, Inc. does not have a parent corporation and there is no publicly held company that owns 10% or more of its stock.

TABLE OF CONTENTS

Page

Questions Presented i

Corporate Disclosure Statement ii

Table of Contents iii

Table of Cited Authorities iv

Statement of the Case 1

Reasons for Denying the Petition 5

I. A Petition for Writ of Certiorari Should Not be Granted Absent Compelling Reasons. ... 5

II. The Petition for Writ of Certiorari Should be Denied Because the Question Presented by Petitioner was not Raised in the Proceedings Below and Thus, the Eleventh Circuit's Decision did not Create a Circuit Split. 6

III. Even if Petitioner had Raised the Question Presented in the Proceedings Below, the Petition for Writ of Certiorari Should be Denied Because Petitioner did not Present Sufficient Evidence that Richard Collins is a Proxy for InfoPro Group, Inc. 8

Conclusion 9

TABLE OF CITED AUTHORITIES

Page

SUPREME COURT CASES

Burlington Indus. v. Ellerth, 524 U.S. 742 (1998) . . . *passim*

Dewey v. Des Moines, 173 U.S. 193 (1899) 7

Duignan v. United States, 274 U.S. 195 (1927) 6

Faragher v. City of Boca Raton, 524 U.S. 775 (1998) . . . . . *passim*

Pa. Dep't of Corrections v. Yeskey, 524 U.S. 206 (1998) 6

Youakim v. Miller, 425 U.S. 231 (1976) 6

OTHER FEDERAL CASES

Ackel v. Nat'l Commc'ns Inc., 339 F.3d 376 (5th Cir. 2003) 8

Johnson v. West, 218 F.3d 725 (7th Cir. 2000) 8

SUPREME COURT RULES

Supreme Court Rule 10 5

STATEMENT OF THE CASE

Petitioner Brandi Dearth ("Petitioner" or "Dearth") is a former employee of Respondent InfoPro Group, Inc. ("InfoPro"), a national medical transcription and health information management company based in Augusta, Georgia. (Pet. App. B at 11a-12a). InfoPro hired Petitioner on June 13, 2001 to serve as the Administrative Assistant to Respondent Richard L. Collins ("Collins"), InfoPro's Chief Executive Officer. (*Id.* at 12a). Her job responsibilities included the following: preparing correspondence and reports; setting up travel schedules and appointments; answering the telephone; meeting and greeting clients and visitors; and performing general clerical duties. (*Id.*) Upon the commencement of her employment with InfoPro, Petitioner received a copy of InfoPro's Employee Handbook (the "Handbook"). (*Id.*) The Handbook expressly stated that InfoPro employees were not to be rude, discourteous or uncivil, nor were they to treat others in an abusive, discriminatory or harassing matter. (*Id.*) The Handbook likewise contained a clear policy prohibiting sexual harassment and provided that employees who believed that they had been subject to harassment should immediately notify their supervisor or the Human Resources Department. (*Id.* at 12a-13a).

Almost immediately following the commencement of her employment with InfoPro, Collins became concerned with Petitioner's ability to perform her job duties effectively. (*Id.* at 13a). Specifically, Collins began receiving complaints from other employees that Petitioner exhibited extremely rude behavior towards them. (*Id.*) Although Collins spoke with Petitioner several times regarding her need to improve her attitude, her unprofessional behavior persisted, and in

February 2002, Collins decided he had no choice but to terminate Petitioner's employment. (*Id.*) After learning of Collins' decision to terminate her employment, Petitioner became extremely upset and begged Collins not to fire her. (*Id.*). At that point, Collins decided to give Petitioner yet another chance to improve her behavior. (*Id.*)

Unfortunately, Collins continued to receive complaints from InfoPro employees regarding Petitioner's rude and abusive behavior after February 2002. (*Id.* at 13a-14a). In this regard, not only was Petitioner verbally abusive to the husbands of two InfoPro employees, but she also caused another InfoPro employee to resign her position because she could no longer stand to work with Petitioner. (*Id.* at 14a). Unable to allow Petitioner's rude and discourteous behavior to continue to impact the InfoPro workforce negatively, Collins decided to terminate Petitioner's employment after discussing the issue with other members of InfoPro management, including Collins' wife, who served as InfoPro's Director of Operations. (*Id.*)

On the evening of November 8, 2002, Collins asked Petitioner to meet with him and InfoPro's Director of Marketing. (*Id.*) At the outset of that meeting, Collins explained that InfoPro was terminating Petitioner's employment and providing her with four weeks of severance pay. (*Id.*) In response, Petitioner accused Collins of sexual harassment. (*Id.*) It is undisputed that this was the first time Petitioner complained of alleged sexual harassment by Collins to anyone at InfoPro, including Collins himself. (*Id.* at 16a). Indeed, Petitioner admits that she did not file a charge with the Equal Employment Opportunity Commission ("EEOC") or lodge a complaint through the procedure specified in the Handbook at any point during her employment. (*Id.*)

Within a week of the termination of her employment, Petitioner filed a charge of discrimination with the EEOC. (*Id.* at 17a). After receiving a Right to Sue letter, Petitioner filed her Complaint in the United States District Court for the Southern District of Georgia (the "District Court") on December 16, 2003, alleging that InfoPro and Collins had taken certain actions against her in violation of Title VII of the Civil Rights Act of 1964 ("Title VII") and various state laws. (*Id.*)

Following the completion of discovery, InfoPro and Collins each moved for summary judgment on Petitioner's claims. (*Id.* at 11a). In an Order dated March 17, 2005, the Honorable Dudley H. Bowen granted InfoPro's and Collins' Motions for Summary Judgment, dismissing Petitioner's Title VII claims with prejudice and her pendent state law claims without prejudice. (*Id.* at 36a). In dismissing Petitioner's Title VII claims against Collins, Judge Bowen relied on the well-established principle that "[t]he relief granted under Title VII is against the employer, not individual employees whose actions would constitute a violation of the Act." (*Id.* at 23a). Judge Bowen's analysis in dismissing Petitioner's Title VII sexual harassment claims against InfoPro was more complex. (*Id.* at 27a) First, after a thorough review of the record, Judge Bowen concluded that the conduct alleged by Petitioner, even if true, was not sufficiently severe or pervasive to give rise to a claim for sexual harassment under Title VII, emphasizing that there was no evidence that the alleged conduct interfered with or altered Petitioner's job duties. (*Id.* at 27a-32a). Second, Judge Bowen determined that even if the alleged conduct was severe and pervasive under the applicable standards, InfoPro was entitled to the protections of the *Faragher-Ellerth* defense as articulated in the cases of *Burlington Indus. v. Ellerth*, 524 U.S. 742, 761-65 (1998)

and *Faragher v. City of Boca Raton*, 524 U.S. 775, 807 (1998). (Pet. App. B at 32a-35a). This conclusion was based on the following facts: (1) InfoPro had a policy in place that addressed workplace harassment and specifically set forth a procedure for complaining about any such harassment, and (2) Petitioner unreasonably failed to avail herself of InfoPro's harassment policy by not notifying anyone in InfoPro management about the alleged harassment during her employment. (*Id.*)

Petitioner appealed the decision of the District Court to the United States Court of Appeals for the Eleventh Circuit (the "Eleventh Circuit"). (Pet. App. A at 1a). Specifically, Petitioner challenged the decision of the District Court on three grounds. First, she argued that the law permitted Collins to be held liable in his individual capacity under Title VII. (*Id.* at 2a-7a). Second, she argued that the alleged conduct by Collins, if true, was sufficiently severe and pervasive to give rise to a Title VII sexual harassment claim under applicable laws. (*Id.* at 8a). Third, Petitioner argued that InfoPro was not entitled to the *Faragher-Ellerth* defense because (1) a tangible employment action was taken against her, and (2) her failure to report the harassment was reasonable given that any attempt to do so allegedly would have been futile. (*Id.* at 8a-9a).

After careful consideration of the issues, the Eleventh Circuit affirmed the District Court's grant of summary judgment in favor of Collins and InfoPro. (Pet. App. A at 10a). In doing so, it agreed with the District Court that Collins could not be held individually liable under Title VII. (*Id.* at 7a). It also agreed with the District Court that InfoPro was entitled to the *Faragher-Ellerth* defense because "(1) InfoPro exercised reasonable care to prevent and promptly correct

any sexually harassing behavior, by virtue of its sexual harassment policy in its employee handbooks, and (2) [Petitioner] unreasonably failed to take advantage of any preventative or corrective opportunities provided by InfoPro, or to otherwise avoid harm, by failing to notify anyone at InfoPro of Collins' alleged harassment." (*Id.* at 8a-9a). Because Petitioner did not contend either on appeal or in the underlying District Court proceeding that the *Faragher-Ellerth* defense was unavailable to InfoPro because Collins was InfoPro's proxy, neither the District Court nor the Eleventh Circuit addressed that argument in rendering their respective opinions. (Pet. App. B at 32a-35a; Pet. App. A at 8a-9a). After her Petition for Rehearing was denied by the Eleventh Circuit, (Pet. App. C at 37a), Petitioner filed her Petition for Writ of Certiorari with this Court.

REASONS FOR DENYING THE PETITION

I. A Petition for Writ of Certiorari Should Not be Granted Absent Compelling Reasons.

Supreme Court Rule 10 states that "[r]eview on a writ of certiorari is not a matter of right, but of judicial discretion . . . [and] will be granted only for compelling reasons." One example of such a compelling reason (and the compelling reason Petitioner erroneously claims to exist here) is a split among the Courts of Appeals on an "important matter." Sup. Ct. R. 10(a). As demonstrated below, however, because the Eleventh Circuit did not even address the issue that Petitioner brings to this Court, it cannot be said that the Eleventh Circuit's ruling on that issue created a split among the Courts of Appeals. Consequently, granting Petitioner's request for a writ of certiorari would not unify the nation's law on any important matter but would merely permit

Petitioner to, once again, seek relief that has been denied by two federal courts.

II. The Petition for Writ of Certiorari Should be Denied Because the Question Presented by Petitioner was not Raised in the Proceedings Below and Thus, the Eleventh Circuit's Decision did not Create a Circuit Split.

This Court has held that, "[w]here issues are neither raised before nor considered by the Court of Appeals, this Court will not ordinarily consider them." *Pa. Dep't of Corrections v. Yeskey*, 524 U.S. 206, 212-13 (1998); *see also Youakim v. Miller*, 425 U.S. 231, 234 (1976) ("Ordinarily, this Court does not decide questions not raised or resolved in the lower court."); *Duignan v. United States*, 274 U.S. 195, 200 (1927) (declining to review issue not presented below and stating that "[i]t is only in exceptional cases coming here from the federal courts that questions not pressed or passed upon below are reviewed."). The issue that Petitioner has asked this Court to review is whether an employer [is] entitled to the *Faragher-Ellerth* affirmative defense where the alleged harasser is shown to be a proxy for the employer. (Petition at *i*). Significantly, however, Petitioner never asked the Eleventh Circuit to address this issue. To the contrary, Petitioner's argument that InfoPro was not entitled to the *Faragher-Ellerth* defense was based solely on her contentions that (1) she suffered a tangible employment action, and (2) she was reasonable in her failure to employ InfoPro's internal policy. (Pet. App. A at 8a-9a). Never did she raise the issue of whether Collins, her alleged harasser, was a proxy for InfoPro, which is evidenced by the fact that the Opinion of the Eleventh Circuit made no mention of this issue. (*Id.*)

Similarly, Petitioner never argued to the District Court that the *Faragher-Ellerth* defense was unavailable to InfoPro because Collins was a proxy for InfoPro. Rather, Petitioner's argument that the *Faragher-Ellerth* defense should not apply was based solely on these four reasons: (1) she suffered a tangible employment action; (2) a jury, not a court, should determine the applicability of the *Faragher-Ellerth* defense; (3) InfoPro's adoption of a policy against sexual harassment did not constitute reasonable care to prevent harassment; and (4) Petitioner's failure to employ InfoPro's internal policy against sexual harassment was not unreasonable. Because Petitioner failed to raise the proxy issue before the District Court, it was not addressed in the Opinion of the District Court. (Pet. App. B at 32a-35a).

To reiterate, because Petitioner never raised the issue of whether a finding that Collins was a proxy for InfoPro would invalidate InfoPro's *Faragher-Ellerth* defense, neither the District Court nor the Eleventh Circuit ruled on that issue. (Pet. App. A at 8a-9a; Pet. App. B at 32a-35a). Therefore, Petitioner's claim that "a review is warranted to resolve a split among the Circuits" is incorrect. (Petition at 5). Essentially, Petitioner is making the nonsensical argument that the Eleventh Circuit deviated from other circuits with regard to an issue on which it did not rule. *See Dewey v. Des Moines*, 173 U.S. 193, 200 (1899) ("A point that was never raised cannot be said to have been decided adversely to a party, who never set it up or in any way alluded to it.") Because the Eleventh Circuit's decision did not create a circuit split on the issue of whether the *Faragher-Ellerth* defense is available where the alleged harasser is shown to be the employer's proxy, it cannot be said that a compelling reason exists for this Court to review that issue as raised for the first time in the Petition.

III. Even if Petitioner had Raised the Question Presented in the Proceedings Below, the Petition for Writ of Certiorari Should be Denied Because Petitioner did not Present Sufficient Evidence that Richard Collins is a Proxy for InfoPro Group, Inc.

Even if Petitioner had raised the argument in the proceedings below that the *Faragher-Ellerth* defense was unavailable because Collins was allegedly a proxy for InfoPro, she could not have prevailed on such a claim because she provided no evidence to suggest that Collins was, in fact, a proxy for InfoPro. In her Petition, Petitioner appears to rely exclusively upon Collins' ownership of company stock, his title, and the alleged fact that he "was involved in directing and supervising the operations of the business." (Petition at 2). But at least one appellate court has stated that "[s]tock ownership is not a prerequisite for acting as a corporation's proxy," *Ackel v. Nat'l Commc'ns Inc.*, 339 F.3d 376, 384 (5th Cir. 2003), and another has held that having "an important title, 'Chief of Police,'" does not make a person the proxy for his employer. *Johnson v. West*, 218 F.3d 725, 730 (7th Cir. 2000). Rather, courts addressing the issue of whether an alleged harasser should be deemed the employer's proxy for purposes of determining the availability of the *Faragher-Ellerth* defense have looked to the scope of the alleged harasser's job duties and the level of control he exercised over the employer's operations. *See Ackel*, 339 F.3d at 384 (considering the unchallenged contention that the alleged harasser "was in charge of all aspects of the corporation's business"); *Johnson*, 218 F.3d at 730 (finding that the Chief of Police was not a proxy for his employer because he reported to numerous supervisors). Here, even if she had preserved the issue for appeal, Petitioner has not presented any competent evidence warranting a finding that Collins'

job duties and degree of control over InfoPro's operations were such that he should be deemed InfoPro's proxy for purposes of determining the availability of the *Faragher-Ellerth* defense. For this reason too, the Petition should be denied.

CONCLUSION

Petitioner never asked the District Court or the Eleventh Circuit to address the issue of whether Collins was a proxy for InfoPro and, if so, what affect such a finding would have on the availability of the *Faragher-Ellerth* defense. Consequently, neither lower court has given this Court a ruling on that issue to review. Further, even if this Court were inclined to examine an issue that was not raised and decided in the lower courts, Petitioner has failed to present any evidence regarding the scope of Collins' job duties and degree of control over InfoPro's operations that would permit the Court to conclude that Collins was a proxy for InfoPro. As such, Respondents respectfully submit the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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